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Nos. 98-405 & 98-406

IN THE

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF ON REARGUMENT OF APPELLANTS GEORGE PRICE, *ET AL.*

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This Court's Order of June 24, 1999, directs the parties to file supplemental briefs addressing the following questions:

1. Does the purpose prong of § 5 of the Voting Rights Act of 1965 extend to a discriminatory but non-retrogressive purpose?

2. Assuming *arguendo* that § 5 prohibits the implementation of a districting plan enacted with a discriminatory, non-retrogressive purpose, does the government or the covered jurisdiction bear the burden of proof in this issue?

Section 5 itself, its history, and this Court's teachings on the "purpose" prong of § 5 all support an affirmative response to the first question. A voting change enacted with a discriminatory but non-retrogressive purpose is foreclosed from § 5 preclearance.

In response to the second question, the covered jurisdiction bears the burden of proving that any voting change, whether retrogressive or not, is nondiscriminatory. This Court's decisions, § 5 and its legislative history, and general principles regarding the allocation of the risk of nonpersuasion all support this conclusion. This also is a fair and reasonable burden to place on covered jurisdictions. The prima facie showing of nondiscriminatory purpose that should be expected of the covered jurisdiction is modest, requiring evidence that legitimate, verifiable reasons, not involving racial animus, motivated the proposed voting change. The Attorney General and any intervening defendants should have the obligation to bring forward in the first instance any evidence of racially discriminatory intent. Covered jurisdictions, where such evidence of discriminatory purpose is proffered, have the opportunity and obligation to rebut it in order to obtain preclearance.

I. THE PURPOSE PRONG OF § 5 OF THE VOTING RIGHTS ACT OF 1965 EXTENDS TO A DISCRIMINATORY BUT NON-RETROGRESSIVE PURPOSE.

Section 5 of the Voting Rights Act of 1965 requires states or political subdivisions identified by criteria specified in the Act to obtain a declaratory judgment in the United States District Court for the District of Columbia that any change in a voting "qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (App. 244a-245a).[1]

[1] "App." refers to the separately bound Appendix to the Jurisdictional Statement filed on behalf of Janet Reno in No. 98-405.

Alternatively, such voting changes may be precleared by submission to the Attorney General. *Id.*

From this Court's earliest consideration of the Act, it has identified § 5 as a key element in the protections carefully designed by Congress to eradicate racial discrimination in voting that impairs the free and equal participation of African-Americans and other minorities in the political process. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315-16, 319-20 (1966). When this Court in *Katzenbach* upheld the power of Congress to enforce the Fifteenth Amendment through the Voting Rights Act of 1965, it closely reviewed the extensive hearings, testimony, and floor debate that formed the factual basis for the "overwhelming" assessment of both chambers of the Congress that strong action was needed. *Id.* at 309. The Court summarized the factual points that "emerge[d] vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates[:]

> First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."

Id. Section 5 thus stands on a remedial footing, based on the extensive factual record that undergirds the Voting Rights Act. *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 156-57 (1977).

Congress further "found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *Katzenbach*, 383 U.S. at 328 (footnote omitted). Case-by-case litigation under previous statutes attempting to secure Fifteenth Amendment rights "proved ineffective" because it was burdensome and

slow. *Id.* at 314. Even when plaintiffs succeeded in obtaining judgments outlawing racially discriminatory voting practices, "some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.* (footnote omitted).

Congress required covered jurisdictions to demonstrate that each voting change "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (App. 244a-245a) (emphasis added). "By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980) (emphasis in original); *accord Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) ("once a jurisdiction has been designated, [§ 5 of] the Act may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws in that jurisdiction") (emphasis in original).

In defining the "effect" prohibited by § 5 as a retrogressive one, the Court carefully preserved the vitality of the "purpose" prong to reach any voting change motivated by racially discriminatory animus: "We conclude . . . that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

Beer construed the word "effect" in § 5 to mean only a retrogressive impact. Because the Court took care to preserve the possibility that a discriminatory purpose could motivate a voting change that creates no retrogression, *Beer* does not limit the universe of voting changes "denying or abridging the right to vote on account of race or color" only to those that involve retrogression. *Accord City of Richmond* v. *United States*, 422 U.S. 358, 378-79 (1975) ("annexation proved to be [animated by a discriminatory purpose] and not

proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be"); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (an electoral scheme that "might otherwise be said to reflect the potential strength of the minority community . . . would nevertheless be invalid if adopted for racially discriminatory purposes").

Based on this solid foundation, this Court, in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987) and *Busbee* v. *Smith*, 459 U.S. 1166 (1983), rejected voting changes that were demonstrated to be infected with a racially discriminatory purpose although they lacked a retrogressive effect. The Court's rejection of preclearance in both cases could only have been based on the conclusion that § 5 bars preclearance of voting changes adopted with racially discriminatory purpose even if the effect is non-retrogressive, since the trial courts in both cases found no retrogression. *See City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458-59 (D.D.C. 1983) (rejecting argument by covered jurisdiction that annexation could have no discriminatory purpose because it had no discriminatory effect); *Busbee* v. *Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982) ("the voting plan does not have a discriminatory effect, as that term has been construed under the Voting Rights Act") (citations omitted).

The practical application of the statute makes clear why "purpose" in § 5 encompasses any racially discriminatory purpose to deny or abridge the right to vote regardless of whether the enacting body intends retrogression. If "purpose" were limited to "retrogressive intent," the purpose and effect prongs would cover virtually the same set of voting changes. Voting changes that "hold the line" on minority electoral participation, even if that line is held at a deliberately and discriminatorily low level, would be required to be precleared, even if they were adopted with blatantly racist intent.

Put another way, limiting "purpose" to purpose to retrogress elevates to nearly dispositive significance the "effect" factor in the analysis under *Village of Arlington*

Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). The Court has made clear in this case that the *Arlington Heights* analysis should guide the § 5 inquiry into whether a voting change has the purpose of denying or abridging the right to vote on account of race or color. *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997); App. 48a ("*Bossier I*"). The effect of a voting change—whether it is positive, negative or neutral in its impact on racial minorities—is a salient factor in determining whether the change was adopted with a racially discriminatory intent. Impact, however, "'is not the sole touchstone of an invidious racial discrimination.'" *Arlington Heights*, 429 U.S. at 265, (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Limiting "purpose" to "intent to retrogress" would effectively limit the *Arlington Heights* inquiry to the "effect" factor.

Limiting "purpose" to "intent to retrogress" also may foreclose meaningful preclearance review of voting changes that clearly are subject to preclearance under § 5 but that do not lend themselves readily to vote dilution or other mathematical analyses. *See, e.g., Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32 (1978) (change in leave policies for employees who work in political campaigns is subject to § 5 preclearance); *Hadnott* v. *Amos*, 394 U.S. 358 (1969) (same with respect to change in filing provisions for independent candidates). If the effect of each change were to become essentially dispositive, because the search for discriminatory purpose was limited to a search for intent to retrogress, it is unclear what proof would be probative in a § 5 declaratory judgment action seeking preclearance of this type of change.

For all of these reasons, the simplest and most direct understanding of the plain language of § 5 is also the correct one: A voting change adopted with the purpose of discriminating on the basis of race or color should be denied preclearance.

II. THE COVERED JURISDICTION BEARS THE BURDEN OF PROOF TO SHOW THAT ITS DISTRICTING PLAN WAS ENACTED WITHOUT A DISCRIMINATORY PURPOSE.

This Court repeatedly has ruled that the covered jurisdiction bears the burden of proof, *i.e.*, the risk of non-persuasion, in a § 5 declaratory judgment action on the issue of whether a voting change was animated by a racially discriminatory purpose. This principle is rooted in the terms of § 5, which require the covered jurisdiction to take the initiative to file the declaratory judgment action or administrative preclearance request for a ruling that the voting change "does *not* have the purpose and will *not* have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c, App. 244a-245a (emphases added). The requirement that the covered jurisdiction carry the burden of proof also is supported specifically by the history of § 5, as well as the more general framework for allocating burdens of proof in civil litigation.

A. In *Katzenbach*, this Court upheld the constitutionality of the Voting Rights Act "putting the burden of proof on the areas seeking relief" under § 5 in the form of a declaratory judgment preclearing a voting change. 383 U.S. at 335. The Court has elaborated that "[i]t is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof," because "[t]he very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting." *Georgia* v. *United States*, 411 U.S. 526, 538 & n.9 (1973).

Because § 5 "is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act," § 5 incorporates procedural protections to avoid evasion including the fact that "the burden of proof (the risk of non-persuasion) is placed upon the covered jurisdiction." *McCain* v. *Lybrand*, 465 U.S. 236, 257 (1984). Indeed, the Court has identified the "shift" in the burden of proof—from a plaintiff in the usual case challenging state action as violative of the Constitu-

tion to the covered jurisdiction in a § 5 action showing that a proposed voting change is non-discriminatory—as a respect in which § 5 reaches more broadly than the Fifteenth Amendment itself. *Beer*, 425 U.S. at 147-48.

The rule that the burden of proof rests with the covered jurisdiction is the same for consideration of both the "effect" and "purpose" prongs of § 5: "Under § 5, the [covered jurisdiction] bears the burden of proving lack of discriminatory *purpose and effect*." *City of Rome*, 446 U.S. at 183 n.18 (emphasis added) (citations omitted). *Accord McDaniel* v. *Sanchez*, 452 U.S. 130, 137 (1981). Where the Court has faced the issue of purpose alone, it has stressed that the covered jurisdiction "has the burden of proving the absence of discriminatory purpose respecting voting." *City of Pleasant Grove*, 479 U.S. at 472 n.12 (emphasis omitted).

B. Congress carefully and deliberately placed the burden of proof on covered jurisdictions. The House Report on the reauthorization of the Voting Rights Act in 1970 and the Senate Report on the 1982 reauthorization reflected on the burden of proof in light of the Court's decision in *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969):

> The decision underscores the advantage section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color. . . . Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote.

H.R. Rep. No. 91-397, at 8 (1969), quoted in Joint Views of Ten Members of the [Senate] Judiciary Comm., 91st Cong., 2nd Sess., 115 Cong. Rec. 5521 (1970),[2] and Report of the

[2] "Those ten members of the Committee, including Senators Hugh Scott and Robert Griffin, sponsored the Scott-Hart extension of the Act which became law. The Supreme Court has cited their views as the committee report on the bill which was enacted.

Comm. on the Judiciary on S.1992, S. Rep. No. 97-417, at 7 (1982).

When Congress first reauthorized the Voting Rights Act, it specifically rejected proposed amendments which would have placed the burden of proof on the Attorney General. *See* 116 Cong. Rec. 6515-22 (1970). *See also Hearings on H.R. 4249, H.R. 5538, and Similar Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 289-90 (1969). Congress' careful consideration and rejection of these provisions demonstrate its unmistakable intent to place the burden on the covered jurisdictions. *See, e.g.*, 116 Cong. Rec. 6168 (1970); 116 Cong. Rec. 6624-25, 6644 (1970).

Congress intended that the burden of proof be on the covered jurisdiction and so provided in the Act. Its conclusion is owed deference because it is clear and constitutional, as this Court held in *Katzenbach*. The result Congress reached also is sound because it corresponds with the principles that courts and commentators routinely invoke to determine who should have the risk of nonpersuasion.

C. Even if it were not already well-established that covered jurisdictions bear the burden of proof in § 5 declaratory judgment actions, general principles governing the allocation of burdens of proof would support the determination made by Congress to place that burden on covered jurisdictions in § 5 actions. Generally speaking, the risk of nonpersuasion falls on the plaintiff, whether the action seeks damages, injunctive relief, or a declaratory judgment. *See* 2 *McCormick on Evidence* § 337 at 427 (4th ed. 1992). Indeed, a "well-developed line of authority . . . holds that a plaintiff in a declaratory action who voluntarily goes forward and attempts to prove his case will be held to have assumed the risk of nonpersuasion." 10B Charles Alan Wright, Arthur R. Miller

Seven of the ten Senators had been sponsors in 1965 of S.1564, the bill enacted as the Voting Rights Act." Report of the Comm. on the Judiciary on S.1992, S. Rep. No. 97-417, at 7 n.10 (1982).

& Mary Kay Kane, *Federal Practice and Procedure* § 2770, at 679-80 (1998) (footnote omitted).

No one theory or rule circumscribes the allocation of the risk of nonpersuasion where the burden of proof is not already determined by statute, as it clearly is in § 5. *See* 9 John Henry Wigmore, *Evidence in Trials at Common Law* § 2486, at 292 (Chadbourn rev. 1981). In allocating this burden, courts weigh the character of the issues, the pleadings, and applicable substantive law. Over time, a framework has emerged that considers factors which can be grouped into the categories of probability, fairness, and policy. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988) (citing considerations of "fairness, public policy, and probability" in applying presumption of reliance in fraudulent misrepresentation securities case); Fleming James, Jr. and Geoffrey C. Hazard, Jr., *Civil Procedure* § 7.8 (3rd ed. 1985); 2 *McCormick* § 337, at 432; 21 Charles Alan Wright and Kenneth W. Graham, *Federal Practice and Procedure* § 5122 (1977). Each of the three prongs—fairness, probability and policy—supports Congress' determination to place the burden of proof in § 5 declaratory judgment actions on the covered jurisdictions.

The "fairness" factor involves consideration of which party has the best access to information and control over the evidence. *See* James at § 7.8; 2 *McCormick* § 337, at 429-30. In a § 5 preclearance action, there is no question that the covered jurisdiction is in the best position to bring forward the evidence that is probative on *Arlington Heights* factors. This evidence involves not only the anticipated effect of the voting change, but the historical background of the adoption of the change, the specific sequence of events leading to the decision, consistency with—or departures from—ordinary procedures and substantive considerations, and contemporary statements of participants in the process. *Arlington Heights*, 429 U.S. at 267-68.

This superior access to probative evidence was part of the basis for allocating the burden of proof to the covered jurisdiction seeking a § 5 declaratory judgment. During the

1970 reauthorization debate, Senator Fong explained: "The . . . burden of proof is placed upon the jurisdiction to show that the new voting law or procedure does not have the purpose or effect of discriminating. Those who know the law or procedure best and what motivated its passage must come forward and explain it." 116 Cong. Rec. 6154 (1970). Representative McCulloch, ranking minority member of the House Judiciary Committee, explained during the floor debate: "The burden of proof under section 5 is rightfully placed upon the jurisdiction to show that the new voting law or procedure is not discriminatory. As in tort law, when circumstances give rise to an inference that there has been misconduct, the party that has access to the facts is called upon to rebut the inference and show that its conduct was proper." 115 Cong. Rec. 38486 (1969).

The second general factor considered in allocating burdens of proof is a judicial estimate of the probabilities, which involves deciding which party's contention is the more extreme departure from the norm. *See* James at § 7.8; 2 *McCormick* § 337, at 430. In a § 5 declaratory judgment action, the covered jurisdiction is before the district court because Congress has found that jurisdictions with specific characteristics had deliberately tried to keep African-Americans and other minorities from the effective exercise of the franchise. *Katzenbach*, 383 U.S. at 308-15. Since Congress found that voting changes proffered by such a jurisdiction are relatively likely to be discriminatory, the burden was placed on the covered jurisdiction to show that a particular proposed change is not.

Policy considerations constitute the third factor in the allocation of burdens of proof. Congress considered policy matters in determining this question for purposes of § 5. First, as noted above, based on the history of discrimination in voting practices and the failure of case-by-case adjudication to stem Fifteenth Amendment violations in voting, *see supra* 3-4, Congress placed the ultimate burden of persuasion on covered jurisdictions. Second, as this Court has recognized, such a statutory scheme is fundamentally fair

to covered jurisdictions. *See Katzenbach*, 383 U.S. at 331-32 (discussing bailout provisions of the Act). *See also infra* Part D. As enacted, § 5's procedures and burdens parallel those that covered jurisdictions must face in order to lift § 5 coverage entirely. A state or political subdivision defined within the Act as a jurisdiction required to seek preclearance of voting changes under § 5 can "bail out" of that coverage through a declaratory judgment procedure under § 4 of the Voting Rights Act, 42 U.S.C. § 1973b(a). This Court has made clear that the burden of proof on a covered jurisdiction in order to obtain an end to the preclearance requirement was not intended to be onerous: "[A]n area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government." *Katzenbach*, 383 U.S. at 332 (footnote omitted).[3]

Nearly 35 years have passed since the adoption of the Voting Rights Act of 1965. Discriminatory efforts to keep African-Americans and other minorities from being heard at the polls are certainly less overt and no doubt less frequent than they were when this Court decided *Katzenbach*. Congress has not changed either the coverage standard or the burden of proof allocation under § 5, based on its judgment that the preclearance process, with its burden of proof on the covered jurisdiction, remains important to the enforcement of the Fifteenth Amendment and the equitable availability of the franchise. The judgment of the particular means to be employed to achieve the legitimate and important end of making the promise of the Fifteenth Amendment a reality is the province of Congress. Nothing in the language it has used or the history of the Act suggests that Congress thought some different allocation of the burden of proof would result where a voting change is non-retrogressive.

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[3] The current Voting Rights Act requires proof that the covered jurisdiction has not engaged in racial discrimination in voting for the past 10 years. 42 U.S.C. § 1973b(a).

D. The juxtaposition of the two questions on which the Court directed supplemental briefing suggests an interest in having the parties address whether it is fair and realistic to place the burden of proof on the covered jurisdiction to obtain a § 5 declaratory judgment for a voting change that is neutral or ameliorative in effect. Given the sequence of proof that unfolds in a § 5 preclearance declaratory judgment action, as a practical matter, Congress and the Court have been correct and reasonable in allocating the burden of proof to the covered jurisdiction in all § 5 cases.

As the plaintiff, the covered jurisdiction has the burden of production in its case in chief to put on evidence that its proposed voting change does not have a racially discriminatory purpose or effect. In a case such as this, the covered jurisdiction can make out a prima facie case on the issue of retrogression, and therefore the "effect" prong of § 5, by putting into evidence statistics showing the racial composition of its proposed election districts compared to those in its existing plan.

The question then becomes what evidence the covered jurisdiction must produce concerning the "purpose" of its proposed voting change in order to survive a motion for judgment as a matter of law at the close of its case. *See* Fed. R. Civ. P. 52(c). In its first opinion in this case, the district court described the sequence of proof that it expects:

> To make out a *prima facie* case for preclearance, the School Board must demonstrate that the proposed change will have no retrogressive effect, and that the change was undertaken without a discriminatory purpose. Proof of nondiscriminatory purpose must include "legitimate reasons" for settling on the given change. *Richmond* v. *United States*, 422 U.S. 358, 375 (1975).

App. 105a. When the covered jurisdiction, through credible evidence, demonstrates "objectively verifiable, legitimate reasons" for the proposed non-retrogressive voting change in its case in chief, *City of Richmond*, 422 U.S. at 375, it should

survive a motion for judgment as a matter of law at the close of its case.

Just as in the bailout procedure, the burden of production then shifts to the Attorney General and any intervening defendants to point to evidence that racial animus was a motivating factor in the adoption of the voting change. *See Katzenbach*, 383 U.S. at 332. If the defendants fail to come forward with any evidence, and if the evidence of non-racial purpose offered by the covered jurisdiction is legitimate and credible, the covered jurisdiction should prevail and be granted preclearance. If the defendants come forward with evidence from which racial intent can be inferred, within the framework contemplated by *Arlington Heights*, the three-judge court must make findings on whether intent to discriminate was a motivating purpose in the adoption of the voting change. *See* App. 103a-104a. If the covered jurisdiction has not succeeded in refuting the proof of racial intent or if the evidence on discriminatory purpose is in equipoise, preclearance should be denied.

This simple and sound sequence of proof is very fair to covered jurisdictions. It is the covered jurisdiction, after all, that knows why it wants the voting change. If its actual reasons are sound, non-racial, and legitimate, it should take no substantial effort for the covered jurisdiction to explain them. All that the initial burden of production usually requires is that the jurisdiction repeat in court its analysis, reasoning, and judgment in originally developing and adopting the proposed change.

By placing on the Attorney General and other defendants the burden of initially identifying evidence of racial intent, the presentation in § 5 cases of evidence of discriminatory purpose under the *Arlington Heights* framework is logical and fair. The Attorney General and other defendants who wish to introduce evidence from which an inference of racial purpose may be drawn should have to shape the case on racial intent so that covered jurisdictions know what evidence they must rebut. In other words, the covered jurisdiction

should not have to come forward in its case in chief and negate each factor in the *Arlington Heights* framework.

This case demonstrates the operation of this approach. The Bossier Parish School Board asserted a variety of reasons at various points in this proceeding for its 1992 districting plan. By the time of trial, it claimed that it adopted the same plan as the Police Jury because that plan eliminated consideration of precinct splitting and maximized the prospects for preclearance. *See* App. 106a-108a. The School Board established a prima facie case by articulating non-racial reasons that, if true and proven, could be legitimate reasons for adopting the plan.

The Attorney General and Price intervenors then produced evidence to demonstrate, however, that these were not the real reasons the plan was adopted. That evidence demonstrated that the School Board declined to seek precinct splits to accommodate a districting plan that did not dilute minority voting strength, even though it had previously contemplated doing so for other reasons.[4] The evidence also showed that the School Board intended in its redistricting to adopt a plan different from the Police Jury, even after the Police Jury obtained preclearance. The Attorney General and the intervening defendants also presented extensive evidence of the School Board's historical racial discrimination in voting; its strong motivation to avoid meaningful representation of majority black communities in order to sustain its resistance to school desegregation; and its departures from ordinary districting principles and procedures in the adoption of the 1992 plan.[5] This evidence surely presented a factual question as to whether the School Board's adoption of the 1992 plan was motivated by a racially discriminatory intent.

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[4] The evidence on these issues is reviewed in the Brief of Appellants George Price, *et al.*, ("Price Brief") at 33-37 and in the Reply Brief of Appellants George Price, *et al.*, ("Price Reply Brief") at 11-14.

[5] Price Brief at 27-40; Price Reply Brief at 10-19.

The School Board has the burden of proving that its claimed non-racial reasons for adopting the plan were genuine and legitimate and that the plan was not motivated by the racial animus supported by defendants' proof. The District Court's decision, however, is plainly inconsistent with this allocation of the risk of nonpersuasion. While the court below found "powerful support for the proposition that [the Board] in fact resisted adopting a redistricting plan that would have created majority black districts," including its history of resistance to school desegregation, App. 6a-7a, and "a tenacious determination to maintain the status quo," *id.* at 7a, it nevertheless granted preclearance. The majority below did so because it found the proof of discriminatory purpose insufficient "to rebut the School Board's *prima facie* showing *that it did not intend retrogression.*" *Id.* (emphasis added). But, as demonstrated in Section I above, this was not the proper inquiry because the purpose prong of § 5 extends to a discriminatory but non-retrogressive purpose. The District Court failed to analyze whether the School Board had established that it did not have a discriminatory, though non-retrogressive, purpose. On this record, it is clear that the School Board did not meet this burden.

CONCLUSION

For these reasons and those set forth in the original briefs in this matter, this Court should reverse the judgment below.

Respectfully submitted,

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